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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 730

IN THE MATTER OF HOLLIMAN DRILLING COMPANY,
A CORPORATION

V. H. CARROLL, Trustee, Holliman Drilling Company, a corporation,
Petitioner,

VERSUS

LORENA MORRIS HOLLIMAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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On Brief:

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November, 1964

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-8750

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In the
Supreme Court of the United States

OCTOBER TERM, 1964

No. .....

IN THE MATTER OF HOLLIMAN DRILLING COMPANY,
A CORPORATION

V. H. CARROLL, Trustee, Holliman Drilling Company, a corporation,
Petitioner,

VERSUS

LORENA MORRIS HOLLIMAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

V. H. Carroll, Trustee, Holliman Drilling Company, a corporation, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled case on August 21, 1964.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at CCH 10, Bankruptcy Law

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JURISDICTION

The judgment of the Court of Appeals was entered on August 21, 1964 (*Infra*, Appendix A). The judgment and order of the United States District Court for the Western District of Oklahoma was entered by the Referee in Bankruptcy May 20, 1963, and affirmed by the United States District Court July 11, 1963 (*Infra*, Appendix B). A petition for rehearing was denied on October 12, 1964 (*Infra*, Appendix C). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C.A., § 1254(1) (*Infra*, Appendix D).

QUESTIONS PRESENTED

1. Whether, for the purpose of determining if a mortgage on an oil and gas lease in the State of Oklahoma was a voidable preferential transfer under Section 60 of the Bankruptcy Act, the mortgage was *made* at the time of an ineffective attempted recording thereof and was therefore not a preferential transfer, although the Court of Appeals held in its opinion herein that under the law of Oklahoma said mortgage, at the time of bankruptcy of the transferor, had "the status only of an unrecorded mortgage"; or if for such purpose said mortgage was *made* "immediately before the filing of the petition" as provided by Section 60a (2) of the Bankruptcy Act, and therefore under the facts herein was a voidable preferential transfer?

STATUTE INVOLVED

Sections 60a (2) and b of the Bankruptcy Act (11 U.S.C.A. § 96 a and b) are as follows:

Section a(2) "For the purposes of subdivisions a and b of this section, a transfer of property other than real property shall be deemed to have been made or suffered at the time when it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee. A transfer of real property shall be deemed to have been made or suffered when it became so far perfected that no subsequent bona fide purchase from the debtor could create rights in such property superior to the rights of the transferee. If any transfer of real property is not so perfected against a bona fide purchase, or if any transfer of other property is not so perfected against such liens by legal or equitable proceedings prior to the filing of a petition initiating a proceeding under this Act, it shall be deemed to have been made immediately before the filing of the petition."

Section b "Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent. Where the preference is voidable, the trustee may recover the property or, if it has been converted, its value from any person who has received or converted such property, except a bona fide purchaser from or lienor of the debtor's transferee for a present fair equivalent value: Provided, however, That where such purchaser or lienor has given less than such value, he shall nevertheless have a lien upon such property, but only to the extent of the consideration actually given by him.

Where a preference by way of lien or security title is voidable, the court may on due notice order such lien or title to be preserved for the benefit of the estate, in which event such lien or title shall pass to the trustee. For the purpose of any recovery or avoidance under this section, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction."

STATEMENT

A. The Basic Facts

For the purpose of this petition we accept the facts as stated in its opinion by the Court of Appeals except as to the time when Mr. Holliman knew that the corporation would go into bankruptcy and will set out additional facts as to the knowledge of Mrs. Holliman that the corporation would go into bankruptcy.

The facts stated in the opinion by the court below are as follows:

> "The Holliman Drilling Company, a Delaware Corporation, filed a voluntary bankruptcy petition in the United States District Court for the Western District of Oklahoma on December 27, 1962. It was duly adjudicated bankrupt, and V. H. Carroll, appellant, was appointed trustee.
>
> "On January 29, 1963, the trustee filed a petition with the Court claiming three oil and gas leases known as the Reeves lease, the Pybas lease (both located in Texas) and the Morgan lease (located in Oklahoma) as assets of the bankrupt estate. In the petition, the trustee acknowledged that Lorena Morris Holliman,

appellee herein, claimed interests in the leases, but denied the validity of her claim. Accordingly, he prayed for an order of sale of the three leases free and clear of any liens, encumbrances or claims. On January 30, 1963, he amended his petition to allege that if the interests claimed by Mrs. Holliman were valid, they should be set aside as voidable preferences under Section 60 of the Bankruptcy Act. An Order to Show Cause, and an Amendment thereto, duly issued, and an evidentiary hearing was held at which the following facts were adduced.

"Mrs. Holliman is the wife of C. I. Holliman, president of the bankrupt company. On October 8, 1957, she loaned $70,000.00, which was indisputably her sole and separate property, to the Company. In return, she received a promissory note from the Company dated October 8, 1957, payable on demand and due October 8, 1958, with six percent interest payable monthly. The Company also assigned the three leases as security for the loan. On the same day, the parties entered into a letter agreement which expressly provided that the assignments were made 'as additional security' for the note, that Mrs. Holliman would hold the assignments in escrow, and that they would not be recorded unless payment on the note was defaulted.

"On the due date of the note, the Company issued a renewal note to Mrs. Holliman. It, like the original, was payable on demand, due one year later (October 8, 1959), with six percent interest monthly. The original note was marked 'renewed' and returned to the Company.

"During the Company's 1959-1960 fiscal year, $30,000.00 was paid on the principal of the renewal note. No principal was paid either prior or subsequent to that time. Interest on the note was paid through December 8, 1962.

"Mrs. Holliman retained the assignments in her personal safety deposit box, to which she alone had access, from the time of assignment until recording in December, 1962. Oil runs from the three leases were at all times paid to the Company, not to Mrs. Holliman.

"Financial statements of the Company prepared by a firm of certified public accountants at the close of each fiscal year showed deficits for each year ranging from $113,931.36 (as of May 31, 1957, which was not a complete fiscal year) to $507,562.00 (as of May 31, 1962). None of the statements showed a profit. Mr. Holliman, however, testified without contradiction that the financial statements were based on the book value of equipment, which was lower than market value, and that, in his opinion, the Company was solvent on October 8, 1957. The statements for fiscal years ending May 31, 1958 through May 31, 1962, showed the indebtedness due Mrs. Holliman as a corporate liability secured by 'certain producing oil and gas properties.' These statements were furnished creditors of the Company if requested, although Mr. Holliman conceded that if the Company's creditors had realized that the three leases had been assigned they probably would not have extended further credit.

"Mrs. Holliman was not a stockholder, director or officer of the Company. She had no knowledge of the Company's business and financial transactions, and she had never seen a financial statement or the books or records of the Company. She knew that the Company lost money 'at times,' but she did not know at the time she recorded the assignments that the Company was insolvent. She was, however, 'worried for fear that might be the case.' She did not know that the Company's bills were not being promptly paid. Her husband did not discuss his business at home very much, but he was troubled and not sleeping well.

"In early December of 1962, Mr. Holliman, while consulting their attorney, Mr. Sanford, in Dallas, about other matters, mentioned the assignments which Mrs. Holliman held. Mr. Sanford said that they 'should have been recorded a long time ago' and advised that Mrs. Holliman should record them. Mr. Holliman conveyed this advice to Mrs. Holliman, and she, with the consent of the Company, sent the assignments in to be recorded immediately thereafter. The two Texas leases were recorded in Texas on December 8, 1962, in the Deed Records; the Oklahoma lease was recorded in Oklahoma as an assignment of an oil and gas lease on December 10, 1962. The letter agreement which showed the intention of the parties that the assignments were for security only was not recorded. Mr. Holliman first knew that the Corporation would go into Bankruptcy after consulting his attorney, Mr. J. D. DeBois, of Duncan, Oklahoma, on December 22, 1962."

As to the time *Mr.* Holliman first knew that the corporation would go into bankruptcy, the record shows Mr. Holliman testified that date to be December 2, 1962 (printed record, page 22).

Mrs. Holliman testified that she knew the corporation was going to file bankruptcy after a conversation her husband had with Mr. DeBois on December 22, or 23, 1962 (printed record, page 16).

B. The Decision of the Court of Appeals

The Court of Appeals held that the statement by Mrs. Holliman that at the time she recorded the assignments of the oil and gas leases on December 8 and 10, 1962, she did not know the company was insolvent but was "worried for fear that might be the case," did not show "reasonable

cause to believe that the debtor is insolvent" as required by Section 60b of the Bankruptcy Act, in order to allow the trustee to avoid the transfer.

Said Court of Appeals also held that the assignments of the oil and gas leases were actually mortgages, and that the recording thereof as to the oil and gas lease in Oklahoma was ineffective under Oklahoma law and that "it has the status only of an unrecorded mortgage."

As shown above, the Court of Appeals, although holding the assignment of the Oklahoma oil and gas lease to have the status of an unrecorded mortgage, held said mortgage was *made* at the time of the ineffective recording for the purpose of determining whether or not Mrs. Holliman had reasonable cause to believe the company was insolvent under Section 60b of the Bankruptcy Act, rather than "immediately before the filing of the petition" as provided by Section 60a (2) of the Bankruptcy Act.

The court below held that said transfers were not voidable preferences.

A petition for rehearing filed by petitioner was denied on October 12, 1964.

REASONS FOR GRANTING THE WRIT

The opinion of the Court of Appeals herein is in direct conflict with the decision of the United States Court of Appeals, Seventh Circuit, in the case of *In re Cox* (C.C.A. 7th, 1943), 132 F.2d 881, 52 Am. B.R. (N.S.) 782, and of the decision of the Supreme Court of the United States of America in the case of *Corn Exchange Nat'l Bank & Trust*

Co. v. *Klauder* (1943), 318 U.S. 434, 63 S. Ct. 679, 87 L. Ed. 844, 52 Am. B.R. (N.S.) 506.

Under Section 60a (2) of the Bankruptcy Act a transfer of any property, real or personal, that has not been perfected in the manner provided by law, upon the filing of petition in bankruptcy by the transferor is deemed to have been made immediately before the filing of the petition.

Under Oklahoma law the assignment of the oil and gas lease in Oklahoma having been given as security for a loan, was a mortgage and was not filed of record as provided by the Oklahoma statutes. It therefore follows that it has the status only of an unrecorded mortgage as held on page 10 in the opinion promulgated by the Court of Appeals, August 21, 1964.

We therefore respectfully submit that such mortgage, the assignment of the Oklahoma oil and gas lease, was not made under the Bankruptcy Act until immediately before the filing of the petition in bankruptcy on December 27, 1962; that since, on December 22 or 23, 1962, Mrs. Holliman knew that the petition would be filed, she had actual knowledge of insolvency of her transferor, Holliman Drilling Company, at least five days prior to the time the transfer was made, as fixed by the Bankruptcy Act (Section 60).

The decision of the Court of Appeals herein covers points as follows:

1. Whether or not the mortgages to Mrs. Holliman were voidable preferential transfers,
   a. of the oil and gas lease in Oklahoma
   b. of the two oil and gas leases in Texas.

2. Whether or not the mortgage to Mrs. Holliman on the oil and gas lease in Oklahoma

   a. was unrecorded

   b. and if unrecorded, is it enforceable against the trustee under Section 70 of the Bankruptcy Act.

3. The same questions as to the two oil and gas leases in Texas as set out in 2 above.

In its decision at page 10, the Court of Appeals answered Point 2a, holding that the assignment of the oil and gas lease in Oklahoma is defectively *recorded* and has the status only of an unrecorded mortgage.

In deciding Point 1, the decision makes no distinction between Points 1a and 1b and on page 7 states:

> "Trustee petitioned for review and the Referee certified the following question to the District Court: 'Are the assignments of certain interest in oil and gas leases to Lorena Morris Holliman preferential transfers as defined in Section 60 of the Bankruptcy Act and hence invalid as against the trustee?' The District Court confirmed and adopted the Findings of Fact and Conclusions of Law of the Referee and denied the petition for review.
>
> "In our view, the determinative issue on the basis of this record is whether Mrs. Holliman had reasonable cause to believe that the Company was insolvent *at the time she caused the assignments to be recorded.* Such reasonable cause to believe, outlined by Section 60(b) of the Bankruptcy Act, is an essential element of a voidable preference." (Emphasis added.)

The statement "at the time she caused the assignments to be recorded" is not correct in regard to Point 1a as to the oil and gas lease in Oklahoma.

We limit our discussion at this point to whether or not the mortgage on the oil and gas lease in Oklahoma was a voidable preferential transfer.

Section 60a(2) of the Bankruptcy Act is as follows:

> "(2) For the purposes of subdivisions a and b of this section, a transfer of property other than real property shall be deemed to have been made or suffered at the time when it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee. A transfer of real property shall be deemed to have been made or suffered when it became so far perfected that no subsequent bona fide purchase from the debtor could create rights in such property superior to the rights of the transferee. If any transfer of real property is not so perfected against a bona fide purchase, or if any transfer of other property is not so perfected against such liens by legal or equitable proceedings prior to the filing of a petition initiating a proceeding under this Act, it shall be deemed to have been made immediately before the filing of the petition."

The first sentence of Section 60b of the Bankruptcy Act is as follows:

> "b. Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, *at the time when the transfer is made*, reasonable

cause to believe that the debtor is insolvent." (Emphasis added.)

The determinative issue as to whether or not the mortgage on the oil and gas lease in Oklahoma was a voidable preferential transfer was whether or not Mrs. Holliman had reasonable cause to believe that the company was insolvent *immediately before the filing of the petition in bankruptcy*. The statement on page 7 of the Court's decision that it is *"at the time she caused the assignments to be recorded"* is in error in view of the fact such assignment was not recorded as provided by the law of the State of Oklahoma and therefore had the status of an unrecorded mortgage.

Volume 3, Collier on Bankruptcy, page 1042, Section 60.51, states:

> "The last sentence of §60a(2) reads as follows:
>
> > 'If any transfer of real property is not so perfected against a bona fide purchase, or if any transfer of other property is not so perfected against such liens by legal or equitable proceedings prior to the filing of a petition initiating a proceeding under this Act, *it shall be deemed to have been made immediately before the filing of the petition.*'
>
> "This automatically brings the transfer within the four-month period prior to bankruptcy, thus fulfilling one important element of a voidable preference. Almost as inevitably, it also means that the transfer was made when the debtor was insolvent, and so establishes a second element of a voidable preference. *The transferee's reasonable cause to believe the debtor insolvent must of course be affirmatively shown if the*

> *transfer is to be avoided as preferential, but ordinarily it will not be difficult to show that such 'cause to believe' existed at the date of bankruptcy, so that the trustee's burden of proof is greatly lightened in this respect.*" (Emphasis added.)

and at page 1089, Section 60.56 states:

> "where the transfer is not perfected prior to bankruptcy, the transfer is deemed made immediately before bankruptcy, and this will then be the time to determine the creditor's (or his agent's) reasonable cause to believe that the debtor is insolvent."

Several cases are cited, the principal ones being *Corn Exchange Nat'l Bank & Trust Co.* v. *Klauder, supra,* and *In re Cox, supra.*

In 1950 Congress amended Section 60 as to the tests of when a transfer is made, after which it reads as above. These amendments in no way effect the parts of those decisions which apply here. The amendments left the test as to real estate, that of, when the transfer is good against a bona fide purchase. It removed the bona fide purchaser test as to property other than real estate, and made the test that a transfer is deemed to have been made when it is so far perfected that a subsequent lien is not obtainable thereon by legal or equitable proceedings on a simple contract.

The basic holding of the case of *Corn Exchange Nat'l Bank & Trust Co.* v. *Klauder, supra,* is that if a transfer is unperfected at the time of bankruptcy when tested as provided by Section 60, the time for determining whether or not the elements of a voidable preference exist as to such transfer is the time immediately before bankruptcy.

The 1950 Amendment of Section 60 does not affect this basic holding. In enforcing the provisions of Section 60 in that case the Supreme Court made statements which clearly apply to the situation in the case at bar, saying:

> "Secrecy has the effect of inducing others to go along with the borrower in ignorance where they would not do so if informed."

and

> "neither the words nor the policy of §60(a) afford any warrant for creating exceptions to fit isolated hard cases."

The United States Court of Appeals, Seventh Circuit, in the case of *In re Cox, supra,* passed upon the effect as to the trustee of a mortgage upon real estate which was not recorded until after the filing of the petition in bankruptcy. The 1950 Amendments retained the bona fide purchase test as to real estate so they in no way affected this decision. That Court therein states on page 883 of the decision:

> "This section does not make of the trustee a bonafide purchaser but it fixes a test as to the date at which the transfer is deemed to have been made, viz., when it is perfect against a bonafide purchaser."

and on the same page,

> "As that event did not occur until after bankruptcy, the transfer, under the last sentence of Section 60, sub. a must be deemed completed 'immediately before bankruptcy.' At that time, which we think the same as contemporaneously with bankruptcy, the transferee was charged with notice of insolvency, and hence

should not retain the fruits of the favoritism of the bankrupt."

In its opinion in the case at bar, the Court of Appeals does not say whether the oil and gas lease in Oklahoma is real estate or personal property and cites as authority for its holding cases as to both.

Under the Oklahoma law, however, it makes no difference whether it is real estate or personal property. The result is the same in either case. In Oklahoma an unrecorded mortgage on real estate is not enforceable against a bona fide purchase, and an unrecorded mortgage on personal property is not enforceable against liens thereon by legal or equitable proceedings.

Under either test provided by Section 60, the mortgage was unperfected at the time of the filing of the petition in bankruptcy and the question of whether or not Mrs. Holliman had "reasonable cause to believe the debtor is insolvent," must be determined as provided by Section 60a (2) at the time "immediately before the filing of the petition."

The case of *Barker* v. *British-American Oil Producing Co.* (Okla. 1953), 256 P.2d 807, holds that a lessee of real estate for oil and gas without notice actual or constructive of a prior outstanding unrecorded conveyance thereof to another party, is a bona fide purchaser and is protected against such prior outstanding conveyance.

Many other Oklahoma decisions hold an unrecorded transfer of real estate is not enforceable against a bona fide purchase thereof.

Oklahoma decisions which hold that an unrecorded mortgage of personal property is not enforceable against an attaching or execution creditor, are as follows:

—*Campbell v. Richardson* (Okla. Terr. 1897), 51 Pac. 659;

Greenville Nat'l Bank v. *Evans-Snider-Buel Co.*, 60 Pac. 249;

Frick v. *Oats* (Okla. 1908), 94 Pac. 682;

Bittle v. *Heim* (Okla. 1955), 284 P.2d 731;

Security Bank & Trust Company v. *State* (Okla. 1956), 297 P.2d 922.

The mortgage was unrecorded at the time of the filing of the petition in bankruptcy. The test set out by Section 60a makes the *time for determining the existence of the various elements of a voidable preferential transfer the time*

"immediately before the filing of the petition,"

or as stated *In re Cox, supra,*

"at that time, which we think the same as 'contemporaneously with bankruptcy'."

Mrs. Holliman testified (R. 16) as follows:

Q. "He discussed with you the fact that he was filing bankruptcy, didn't he?

A. He did, yes.

Q. Well now, that is what he had been to see his attorneys about?

A. May I qualify that. After he went to see Mr. DeBois which was the 22nd, 23rd or so of December, but not prior to that time."

Mr. Holliman testified (R. 22):

Q. "Now, Mr. Holliman, when did you first know that you were going to take—that you were going to put the corporation through bankruptcy?

A. After I discussed my entire financial situation with my attorney, Mr. J. D. DeBois of Duncan, Oklahoma, *on December 2, 1962.*"

The voluntary petition in bankruptcy was filed December 27, 1962.

Certainly knowledge that a voluntary petition in bankruptcy is going to be filed gave Mrs. Holliman "reasonable cause to believe that the debtor is insolvent."

In truth, of course, it gave her ACTUAL knowledge that the debtor was insolvent. She had such knowledge at the time as provided by Section 60a for determining the existence of the elements of a voidable preferential transfer, as to the oil and gas lease in Oklahoma. By virtue of the provisions of Section 60 the mortgage on the oil and gas lease in Oklahoma was a voidable preferential transfer. It therefore follows that the opinion of the Court of Appeals promulgated in this case, being in direct conflict with the above cited decision of this Court, and the decision of the Court of Appeals for the Seventh Circuit, should not be allowed to stand.

The total amount of unsecured claims on file in this bankruptcy case is $510,152.10. These creditors at best are going to receive a very small fraction of their debts due.

Mr. Holliman testified as stated in the Court of Appeals opinion, that these creditors would not have extended

this credit if they had known these oil and gas leases were mortgaged to his wife. As stated by this Court in *Corn Exchange Nat'l Bank & Trust Co.* v. *Klauder, supra:*

> "Congress has consistently reached out to strike down secret transfers and the courts have with equal consistency found its efforts faulty or insufficient to that end. Against such a background §60 was drawn and reported to Congress with this explanation of its purpose and effect:
>
> > 'The new test is more comprehensive and accords with the contemplated purpose of striking down *secret liens*'." (Emphasis added.)

CONCLUSION

It is respectfully submitted that the opinion in this case promulgated by Court of Appeals on August 21, 1964, is in conflict with the decision of the Supreme Court of the United States of America and the decision of the United States Court of Appeals, Seventh Circuit.

It is further respectfully submitted that the petition should be granted by this Court in that under Section 60 of the Bankruptcy Act, the assignment of the oil and gas lease not having been filed as required by the law of the State of Oklahoma, it being admittedly a mortgage, it has the status of an unrecorded mortgage, was deemed to have been made immediately before the filing of the petition in bankruptcy; that the record discloses that Mrs. Holliman knew that such petition in bankruptcy was being filed and, therefore, knew that the corporation was insolvent at the time her mortgage was deemed made; and as a result, it constituted a voidable preference under the Act; and that

the decision of the United States Court of Appeals, Tenth Circuit, is in direct conflict with and negates the specific provisions of the Bankruptcy Act.

It is further respectfully submitted that to prevent consternation to the point of rendering specific provisions of such Act ineffective, the petition should be granted and such opinion reviewed and an opinion promulgated by this Court properly applying such provisions of the Bankruptcy Act.

Respectfully submitted,

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November, 1964

APPENDIX

APPENDIX A

FILED
United States Court of Appeals
AUG 21 1964
Robert B. Cartwright
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 7457—May Term, 1964

V. H. CARROLL, TRUSTEE HOLLIMAN DRILLING COMPANY, a corporation, Appellant,	]	Appeal From The United States District Court For The Western District of Oklahoma
v.	]	
LORENA MORRIS HOLLIMAN, Appellee.	]	
In The Matter of Holliman Drilling Company, a corporation.	]	

Robert L. Cox, Oklahoma City, Okla. (James R. Eagleton, Oklahoma City, Okla., was with him on the Brief) for Appellant.

John H. Cantrell, Oklahoma City, Okla. (James A. DeBois, St. Louis, Mo. and Quinlan, Allen and Batchelor, of coun-

sel, Oklahoma City, Oklahoma., were with him on the Brief), for Appellee.

Before PHILLIPS and SETH, Circuit Judges and ARRAJ, District Judge.

ARRAJ, District Judge.

The Holliman Drilling Company, a Delaware Corporation, filed a voluntary bankruptcy petition in the United States District Court for the Western District of Oklahoma on December 27, 1962. It was duly adjudicated bankrupt, and V. H. Carroll, appellant, was appointed trustee.

On January 29, 1963, the trustee filed a petition with the Court claiming three oil and gas leases known as the Reeves lease, the Pybas lease (both located in Texas) and the Morgan lease (located in Oklahoma) as assets of the bankrupt estate. In the petition, the trustee acknowledged that Lorena Morris Holliman, appellee herein, claimed interests in the leases, but denied the validity of her claim. Accordingly, he prayed for an order of sale of the three leases free and clear of any liens, encumbrances or claims. On January 30, 1963, he amended his petition to allege that if the interests claimed by Mrs. Holliman were valid, they should be set aside as voidable preferences under Section 60 of the Bankruptcy Act. An Order to Show Cause, and an Amendment thereto, duly issued, and an evidentiary hearing was held at which the following facts were adduced.

Mrs. Holliman is the wife of C. I. Holliman, president of the bankrupt company. On October 8, 1957, she loaned $70,000.00, which was indisputably her sole and separate property, to the Company. In return, she received a promis-

sory note from the Company dated October 8, 1957, payable on demand and due October 8, 1958, with six percent interest payable monthly. The Company also assigned the three leases as security for the loan. On the same day, the parties entered into a letter agreement which expressly provided that the assignments were made "as additional security" for the note, that Mrs. Holliman would hold the assignments in escrow, and that they would not be recorded unless payment on the note was defaulted.

On the due date of the note, the Company issued a renewal note to Mrs. Holliman. It, like the original, was payable on demand, due one year later (October 8, 1959), with six percent interest monthly. The original note was marked "renewed" and returned to the Company.

During the Company's 1959-1960 fiscal year, $30,000.00 was paid on the principal of the renewal note. No principal was paid either prior or subsequent to that time. Interest on the note was paid through December 8, 1962.

Mrs. Holliman retained the assignments in her personal safety deposit box, to which she alone had access, from the time of assignment until recording in December, 1962. Oil runs from the three leases were at all times paid to the Company, not to Mrs. Holliman.

Financial statements of the Company prepared by a firm of certified public accountants at the close of each fiscal year showed deficits for each year ranging from $113,931.36 (as of May 31, 1957, which was not a complete fiscal year) to $507,562.00 (as of May 31, 1962). None of the statements showed a profit. Mr. Holliman, however, testified without contradiction that the financial statements were based on the book value of equipment, which was lower than market value, and that, in his opinion, the Company was solvent on October 8, 1957. The statements for fiscal years ending May 31, 1958, through May 31, 1962, showed the indebted-

ness due Mrs. Holliman as a corporate liability secured by "certain producing oil and gas properties." These statements were furnished creditors of the Company if requested, although Mr. Holliman conceded that if the Company's creditors had realized that the three leases had been assigned they probably would not have extended further credit.

Mrs. Holliman was not a stockholder, director or officer of the Company. She had no knowledge of the Company's business and financial transactions, and she had never seen a financial statement or the books or records of the Company. She knew that the Company lost money "at times," but she did not know at the time she recorded the assignments that the Company was insolvent. She was, however, "worried for fear that might be the case." She did not know that the Company's bills were not being promptly paid. Her husband did not discuss his business at home very much, but he was troubled and not sleeping well.

In early December of 1962, Mr. Holliman, while consulting their attorney, Mr. Sanford, in Dallas, about other matters, mentioned the assignments which Mrs. Holliman held. Mr. Sanford said that they "should have been recorded a long time ago" and advised that Mrs. Holliman should record them. Mr. Holliman conveyed this advice to Mrs. Holliman, and she, with the consent of the Company, sent the assignments in to be recorded immediately thereafter. The two Texas leases were recorded in Texas on Decembr 8, 1962, in the Deed Records; the Oklahoma lease was recorded in Oklahoma as an assignment of an oil and gas lease on December 10, 1962. The letter agreement which showed the intention of the parties that the assignments were for security only was not recorded. Mr. Holliman first knew that the Corporation would go into bankruptcy after

consulting his attorney, Mr. J. D. DeBois, of Duncan, Oklahoma, on December 22, 1962.

At the evidentiary hearing before the Referee, the trustee attempted to establish his case solely by cross-examination of Mr. and Mrs. Holliman. He produced no witnesses of his own, and introduced only one exhibit—the financial statement of the company as of May 31, 1957. The Referee noted the following in regard to the demeanor and credibility of the witnesses:

> "Lorena Morris Holliman testified in a straightforward manner in tone, demeanor and appearance to be worthy of belief, with no attempt on her part to be evasive or vague. Extensive cross-examination by the attorney for the trustee did not produce any change, confusion or retraction of her direct testimony. The testimony of C. I. Holliman substantiated his wife's testimony and extended cross-examination by the trustee's attorney resulted in no substantial change in his direct testimony."

On the basis of the evidence, the Referee found that the Trustee had failed to prove that the assignments were "for or on account of an antecedent debt" and that Mrs. Holliman ". . . had reasonable cause to believe that the debtor was insolvent." Accordingly, he concluded that the assignments did not constitute voidable preferences under Section 60 of the Bankruptcy Act and Ordered the sale of the leases subject to Mrs. Holliman's security interest in the principal amount of $40,000.00.

Trustee petitioned for review and the Referee certified the following question to the District Court: "Are the assignments of certain interest in oil and gas leases to Lorena Morris Holliman preferential transfers as defined in Section 60 of the Bankruptcy Act and hence invalid as against the trustee?" The District Court confirmed and adopted

the Findings of Fact and Conclusions of Law of the Referee and denied the petition for review.

In our view, the determinative issue on the basis of this record is whether Mrs. Holliman had reasonable cause to believe that the Company was insolvent at the time she caused the assignments to be recorded. Such reasonable cause to believe, outlined by Section 60(b) of the Bankruptcy Act, is an essential element of a voidable preference.[1] We therefore need not decide whether the assignments were for or on account of an antecedent debt, unless the issue of reasonable cause can be decided in favor of the trustee. We do not think it can.

The test of "reasonable cause as defined in this Circuit is ". . . if the creditor has knowledge or notice of facts and circumstances which would incite a person of reasonable prudence under similar conditions to make an inquiry and, if such an inquiry would lead to the development of facts essential to the knowledge of the situation, the creditor is chargeable with such knowledge."[2] The test is an individualized one; what may amount to reasonable cause in one case may only constitute suspicious circumstances in another.[3] The finding below must therefore be viewed in the light of the facts, circumstances and surroundings of this case, and it will not be disturbed unless clearly erroneous.[4]

The strongest evidence in appellee's favor is Mrs. Holliman's statement that she was "worried for fear" the Company might be insolvent. Appellee argues in effect that this "worry" in conjunction with her husband's role as intermediary between her and her attorney two weeks before the decision was made to put the Company in bankruptcy constitutes reasonable cause. We do not think that her worry "for fear," especially in view of the Referee's comments quoted above regarding the demeanor and credi-

bility of the Hollimans as witnesses, constitutes reasonable cause. Nor does the fact, in the light of this record, that she was the wife of the president of the Company.

> "Mere kinship between a debtor and a creditor does not warrant the inference that the creditor has knowledge of the financial condition of the debtor. Such knowledge is not a normal or natural incident of kinship." Vance v. Dugan, 187 F.2d 605, 606 (10th Cir. 1951).

The evidence here is compelling that Mrs. Holliman did not have knowledge of the Company's insolvency. Certainly it cannot be said that the finding below was clearly erroneous.

Appellant raised the additional question in his brief whether he should have taken title to the leases free and clear of Mrs. Holliman's security interest under Section 70(c) of the Bankruptcy Act.[5] Under this Section, the trustee is given the status of an ideal lien creditor whose priority is determined by the substantive law of the state in which the property is situated.[6] Accordingly, the question is whether there is, in the case of the Oklahoma lease, any creditor who could have acquired a lien of any kind under Oklahoma law on the date of bankruptcy superior to the interest of Mrs. Holliman, or, in the case of the two Texas leases, whether there is any creditor who could have acquired a lien under Texas law superior to the interest of Mrs. Holliman.

It is unnecessary to discuss in detail the nature of the assignments made here. Clearly the transaction contemplated by the parties was the creation of a security interest. As noted by the referee, "It is admitted by all concerned that the above assignments were intended only as security to secure the above loan." Moreover, it is clear that the evidence would support a finding under the laws

of both Texas and Oklahoma that the transactions constituted mortgages.[7]

Leaving aside the troublesome problem of labeling the interest of an oil and gas lessee under Oklahoma law,[8] it is settled that a mortgage of such an interest must be recorded in Oklahoma as a real estate mortgage[9] and that if it is not so recorded, it has the status only of an unrecorded mortgage.[10] However, even so considered, Mrs. Holliman's interest in the Oklahoma lease is superior to that of the trustee who occupies the position of a lien creditor without notice[11] under Oklahoma law, and not that of a bona fide purchaser.[12] He does not receive constructive—or even inquiry—notice by virtue of the defective recording,[13] and, as a judgment creditor under Oklahoma law, he acquires a lien only on the actual interest of the judgment debtor.[14] Appellant has cited no authority, and we have found none, by which a lien creditor could acquire any greater interest under Oklahoma law. It is therefore clear that the Court below was correct in holding that the trustee took title to the Oklahoma lease subject to Mrs. Holliman's security interest.

The result is the same with respect to the Texas leases, although the Texas law is considerably different from the Oklahoma law in several respects. It is well settled in Texas that oil and gas leases are real property interests and are subject to the recording statutes.[15] By statute, it is provided that recorded mortgages shall be valid not only as to subsequent bona fide purchasers, but also as to all who have become creditors from the time the mortgage was delivered to the clerk for recording,[16] and recording a mortgage as an absolute conveyance in the deed records does not remove it from the protection of the statutes, even though it is directed by statute[17] that mortgages be recorded in a separate book.[18] Clearly, under Texas law, a creditor who acquired a lien on the date of bankruptcy

would be subject to Mrs. Holliman's security interest in the leases. The trustee is in no better position. The Findings of Fact and Conclusions of Law made by the Referee and adopted and confirmed by the Trial Court are not clearly erroneous. The judgment is AFFIRMED.

FOOTNOTES

1. "Subdivision *b* is the enforcing provision of Section 60; and, as stated previously, presents a further essential element which must be proved to exist before a transfer otherwise preferential under Section 60 may be avoided." 4 Collier, Bankruptcy at p. 987 (14th Ed.).

2. Moran Bros. Inc. v. Yinger, 323 F.2d 699, 702 (10th Cir. 1963).

3. See discussion in 3 Collier, Section 60.54 at p. 1000 (14th Ed.).

4. Moran Bros. Inc. v. Yinger, *supra* at 702; Washington v. Houston Lumber Co., 310 F.2d 881, 882-83 (10th Cir. 1962).

5. The trustee argued in his brief that 70a(5) was applicable here. However, in support of his argument he cited Cooper Grocery Co. v. Park, 218 Fed. 42 (5th Cir. 1914) which turns on Section 47a(2), the statutory predecessor to Section 70c of the present Bankruptcy Act. Under these circumstances, it is difficult to determine what part of 70 the trustee relies on. After an examination of both subdivisions in the light of the facts of this case, we agree with the observation in 4 Collier, Bankruptcy at p. 1403 that ". . . in all reported cases Section 70c does everything that Section 70a(5) does and more besides" and have therefore chosen to discuss only the 70c question. In discussing this question, we do not decide whether it is properly before the Court, not having been certified by the referee to the District Court.

6. Porter v. Searle, 228 F.2d 748, 750 (10th Cir. 1955), Fowler v. Pennsylvania Tire Co., 326 F.2d 526, 530 (5th Cir. 1964).

7. See especially Carter v. Sapulpa & I. Ry. Co., 153 Pac. 853 (Okl. 1915); 46 Okl. Stat. Ann. Section 1; 42 Okl. Stat. Ann. Section 6; Kennard v. Mabry, 14 S.W. 272 (Sup. Tex. 1890); Long v. Fields, 71 S.E. 774 (Civ. App. Tex. 1903); Hamilton v. Green, 101 S.W. 280 (Civ. App. Tex. 1907).

8. An oil and gas lease under Oklahoma law "is a hybrid estate deriving its legal characteristics from both real and personal property, yet it is actually neither . . . It is personalty . . . and also an interest in land." Continental Supply Co. v. Marshall, 152 F.2d 300, 305 (10th Cir. 1945). See the discussion of the various ways in which such an interest has been treated in Oklahoma at pp. 305-06 of Continental Supply Co. v. Marshall, *supra*, and in Phillips Petroleum Co. v. Jones, 176 F.2d 737

(10th Cir. 1949). See also the general discussion in 2 American Law of Property, Section 10.26 which shows the inconsistent results reached in different jurisdictions—and even within the same jurisdiction—on this question.

9. Continental Supply Co. v. Marshall, 152 F.2d 300, 306 (10th Cir. 1945).

10. 46 Okl. Stat. Ann. 8, 10; Pierson v. McCrory, 219 Pac. 640 (Okl. 1923) in which the Court said at p. 643:

> "The assignment was recorded in the proper book for recording such instruments, and not in the mortgage record, and we think *was of the effect of an unrecorded mortgage*, good as between the parties, but not good as against incumbrancers for value without notice."

11. Bergin v. Waterson, 279 F.2d 193, 196 (10th Cir. 1960), In re Production Aids Co., 193 F. Supp. 180 (S.D. Iowa, 1961) and cases cited therein at p. 189. See also discussion in 4 Collier, Bankruptcy, Section 70.53.

12. See discussion in 4 Collier, Section 70.52 and Section 70.55, especially at p. 1450. This status is especially pertinent in this case inasmuch as 16 Okl. Stat. Ann. Section 15 which provides, inter alia, that ". . . no . . . mortgage . . . shall be valid as against third persons unless acknowledged and recorded as herein provided" has been construed to protect only innocent purchasers for value. Gamble v. Cornell Oil Co., 250 F.2d 860 (10th Cir. 1958) and cases cited therein at p. 868. Since the trustee does not have that position, the statute is of no aid to him.

13. See footnote 10 *supra* regarding constructive notice. The Oklahoma cases regarding inquiry notice have their basis in 25 Okl. Stat. Ann. Section 13, which reads as follows:

> "Every person who has *actual notice* of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself." (Emphasis added.)

We do not think this statute can be construed to mean that *constructive* notice of circumstances sufficient to put a prudent man on inquiry as to a particular fact can be deemed to be *constructive* notice of the fact itself without doing violence to the plain meaning of the statute and nullifying the recording statutes.

14. State Bank of Wapanuck v. Burnett, 162 Pac. 1124, 1126-27 (Okl. 1917).

15. Waggoner v. Sigler Oil Co., 118 Tex. 517, 19 S.W.2d 27; Sheffield v. Hogg, 77 S.W.2d 1021 (Tex. Sup. 1934) in which the Court said at p. 1024:

"The oil industry in Texas is laregly dependent for development, growth, or prosperity, on the doctrine that the interest we are considering—such as the lessee's and the lessor's estates under contracts which are in customary use in Texas—are interest in land; and . . . have the protection of . . . the statutes regulating conveyances and mortgages of real estate, and the statutes requiring the record of instruments affecting title to or liens on land, so that purchasers can rely on deed and lien records . . ."

See also 2 Summers, Oil & Gas, Section 557 at pp. 699-701.

16. 19 Vernon's Tex. Civ. Stat. Article 6631.

17. 19 Vernon's Tex. Civ. Stat. Article 6601.

18. See Texas cases cited in footnote 7 *supra*.

APPENDIX B

FILED
MAY 20 1963
William T. Billups, Referee
By_____
Clerk

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF OKLAHOMA

In the matter of	)	
	)	
Holliman Drilling Company,	)	In Bankruptcy
a corporation	)	No. 14900
	)	
Bankrupt	)	

REFEREE'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This is the second appeal taken by the trustee in connection with the administration of the above estate.

[APPENDIX]

Holliman Drilling Company, a Corporation filed its voluntary petition in bankruptcy on December 27, 1962, and upon adjudication the case was referred to the undersigned Referee for administration.

The Holliman Drilling Company was incorporated under the laws of Delaware on August 23, 1956. On October 8, 1957 Lorena Morris Holliman, wife of C. I. Holliman, President of the Holliman Drilling Company, loaned the Holliman Drilling Company, a corporation, the total sum of $70,000.00 being money that was her sole and separate property. The money had come to her by inheritance from her mother and a gift from her father. This is undisputed.

The Holliman Drilling Company executed its promissory to Lorena Morris Holliman on October 8, 1957 in the principal sum of $70,000.00 and by way of security for the repayment of said loan executed assignments to her covering three oil and gas leases, two of which were in Texas and one in Oklahoma. It is admitted by all concerned that the assignments were intended only as security to secure the above loan.

A letter agreement was signed on October 8, 1957 setting out the security agreement between the parties in connection with the assignment of the oil and gas leases.

On October 8, 1958, a renewal note was executed and delivered to Lorena Morris Holliman in the principal amount of $70,000.00; the note of October 8, 1957 was marked "renewed" and returned to the Holliman Drilling Company. Mrs. Holliman was paid by periodic payments all interest due on said loan up to December 8, 1962 and has been paid the total sum of $30,000.00 on the principal, leaving a principal balance due as of December 8, 1962 of $40,000.00. This is undisputed.

Upon receipt of the original note of October 8, 1957 and the assignments of the oil and gas leases Mrs. Holliman put the same in her safety deposit box in the Preston State Bank in Dallas, Texas. She alone had access to her safety deposit box. Except for substituting the renewal note and withdrawing the original note to return, the papers stayed continuously in her exclusive possession and control in her personal safety deposit box until taken out to be mailed for recording. The assignments covering the Texas leases were recorded on December 8, 1962 and the Oklahoma lease on December 10, 1962.

Mrs. Holliman has not, at any time, been a stockholder, director or officer in the Holliman Drilling Company. She had no knowledge of the financial condition of the Company, had never seen a financial statement and was unaware and did not know the Company was going into bankruptcy until after her husband had gone to see his attorney, J. D. DeBois, at Duncan, Oklahoma, on or about December 22, 1962.

The sole issue in this proceeding and this appeal is whether the promissory note and assignment of said oil and gas leases constitutes a preference which is subject to being voided by the trustee. The trustee relies upon Section 60 of the Bankruptcy Act which, in part, defines a preference as follows:

> "A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than other creditor of the same class."

Remington on Bankruptcy, 1957 Edition, summarizes the requirements of a voidable preference in Vol. 4, Sec. 1657, in part as follows:

> "Subdivisions (a) and (b) of § 60, in defining voidable preferences and stating the conditions under which they may be avoided, impose the following requirements for voidability, and a transaction, howsoever preferential it may in fact be, is not voidable under these provisions unless it meets all such requirements:
>
> 1. It must be a 'transfer,' as that term is defined by the Bankruptcy Act, of property of a debtor by or against whom a petition is later filed initiating proceedings under the Act, made 'or suffered' by him to or for the benefit of a creditor, for or on account of an antecedent debt.
>
> 2. The transfer must have been made or suffered by the debtor 'while insolvent.'
>
> 3. It must furthermore have been made or suffered 'within four months before the filing by or against him of the petition initiating a proceeding under' the Bankruptcy Act.
>
> 4. The effect of the transfer must be such as 'to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class;' and
> 5. The creditor receiving the transfer, or to be benefited thereby, or has agent acting with reference thereto, must have had, 'at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent.'
>
> "* * * The statute is so constructed that the first four elements are actually tests of whether a 'preference' exists, the fifth element appearing in Subdivision (b)

as a test of whether, if there is a preference within Subdivision (a), it shall be considered a 'voidable' one. * * * it is well settled that the fifth element is on a parity with the other four for purposes of avoidance, if it cannot be shown, presence of the other four, or any of them, becomes immaterial."

Colliers Bankruptcy Manual, 1961 Edition, Section 60.01, summarizes the elements of a voidable preference as follows:

"Briefly stated the elements of a preference under § 60A consist of a debtor

1. Making or suffering a transfer of his property

2. To or for the benefit of a creditor

3. For or on account of an antecedent debt [resulting in a depletion of the estate],

4. While insolvent, and

5. Within four months of bankruptcy or of the original petition under Chapters X, XI, XII, or XIII of the Act,

6. The effect of which transfer will be to enable the creditor to obtain a greater percentage of his debt than some other creditor of the same class. Subdivision b of § 60 then provides that such a preference may be avoided by the trustee upon proof of the additional element that

7. The creditor receiving or to be benefited by the preference had reasonable cause to believe that the debtor was insolvent.

If any one of the elements of a preference as enumerated in § 60a is wanting, there is no necessity of considering an avoidance of the transfer under § 60b, since

a preference under the terms of § 60 itself has not been established."

The trustee produced no witnesses at the hearing before the Referee on February 12, 1963 and attempted to establish the alleged preference solely by cross-examination of Lorena Morris Holliman and C. I. Holliman, her husband. The trustee introduced one exhibit, being a copy of a financial statement of Holliman Drilling Company of May 31, 1957, being Trustee's Exhibit 2. Lorena Morris Holliman testified in a straightforward manner in tone, demeanor and appearance to be worthy of belief, with no attempt on her part to be evasive or vague. Extensive cross-examination by the attorney for the trustee did not produce any change, confusion or retraction of her direct testimony. The testimony of C. I. Holliman substantiated his wife's testimony and extended cross-examination by the trustee's attorney resulted in no substantial or material change in his direct testimony.

We are mindful that transactions between husband and wife are subject to the closest scrutiny, and even though in this case the loan originally made by Lorena Morris Holliman was to the Holliman Drilling Company, a Corporation, the testimony and evidence was weighed in the light of the closest scrutiny. Our 10th Circuit Court of Appeals in the case of Vance v. Dugan, 187 F.2d 605 (10 Cir. 1951) stated in the body of the opinion:

> " 'Mere kinship between a debtor and a creditor does not warrant the inference that the creditor has knowledge of the financial condition of the debtor. Such knowledge is not a normal or natural incident of kinship.' Citing Orthieb v. Baumer, D.C. S.D. N.Y. 6 F. Supp. 58, Marshall v. Nevins, 9 Cir. 242 F. 476."

The great weight of authority is that the burden of establishing all the elements or component parts of an

alleged voidable preference is upon the trustee, and if the trustee fails to establish or prove one or more of the same then he cannot prevail. One of the clearest statements of the law controlling this case is found in Cate v. Certainteed Products Corporation, 144 P.2d 335 (Sup. Ct. Cal. 1943) which was an action by the trustee in bankruptcy to set aside certain alleged preferential transfers by the debtor. Judgment was for the creditor and against the trustee. The court in the body of the opinion stated the law in regard to alleged voidable preference under the Bankruptcy Act as follows:

> "The bankruptcy law with reference to preferences reads: '(a) A preference is a transfer, as defined in this title, of any of the property of a debtor to * * * a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing * * * against him of the petition in bankruptcy, * * * the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class. * * * (b) Any such preference may be avoided by the trustee if the creditor receiving it * * * has, at the time when the transfer is made, *reasonable cause to believe that the debtor is insolvent.*' (Emphasis added.) (11 U.S.C.A. § 96, subs. a, b). The elements necessary to establish a voidable preference under the foregoing section have been stated to be four and sometimes five in number, depending upon the grouping. Remington on Bankruptcy, 5th Ed., vol. 4-A, secs. 1657-1658, pp. 91-94. Each and every one of these elements, and the parts thereof, must be established by the trustee in order to avoid a transfer. 11 U. S. C. A. § 96, Haas v. Sachs, 8 Cir., 68 F.2d 623; Collier on Bankruptcy, sec. 60, pp. 1248-1249. Particularly it is necessary that the plaintiff trustee in bankruptcy establish that the creditor, at the time of the transfer,

has reasonable cause to believe that the debtor is insolvent. 11 U.S.C.A. § 96, sub. b; Patrick v. Rice, 3 Cir., 98 F.2d 550; Cusick v. Second Nat. Bank, 73 App. D. C. 16, 115 F.2d 150. That issue is essentially one of fact for the trier of fact, including the facts proved and all reasonable inferences which may be drawn from them. If there is any substantial evidence supporting the finding of the trier of fact, it is conclusive on appeal. Kaufman v. Tredway, 195 U.S. 271, 25 S. Ct. 33, 49 L. Ed. 190; Pyle v. Texas Transport, etc., Co., 238 U. S. 90, 35 S. Ct. 667, 59 L. Ed. 1215; Boston Nat. Bank v. Early, 1 Cir., 17 F.2d 691; Westcott v. Nixon, 132 Cal. App. 490, 23 P.2d 75; 8 C.J.S., Bankruptcy, § 215; Remington on Bankruptcy (5th Ed.), vol. 4-A, sec. 1707."

Quoting again from our 10th Circuit Court of Appeals in the case of Vance v. Dugan, 188 F.2d 605 (10 Cir. 1951) the court stated in the body of the opinion:

"The burden is upon the trustee to establish all the elements of a preference under § 96, supra, (11 U.S. C.A. 96) including the element that the creditor had reasonable cause to believe that the bankrupt was insolvent." Citing Pyle v. Texas Transport and Terminal Co. 238 U. S. 90, 35 S. Ct. 667; Remington on Bankruptcy 4th Ed. Vol. 5, § 2301; Collier on Bankruptcy, 14th Ed. Vol. 3, § 60.54; Marshall v. Nevins, 9 Cir. 242 F. 476.

Remington on Bankruptcy, 1957 Edition, Vol. 4 Section 1710.3 states in part as follows:

"The nonrecording of a mortgage is not properly evidence of reasonable cause on the part of the mortgagee to believe the mortgagor to be insolvent. In fact it could be considered an indication of confidence in the mortgagor's solvency. However, if there is secretiveness about an allegedly preferential and voidable

transaction, lending an air of intent not to alert other creditors, it has, in some instances, been considered as at least some indication that the creditor in question had reasonable cause to believe that the debtor-transferor was insolvent."

that no secret lien or secretiveness from other creditors was intended in this transaction is amply established by the accounting reports of the firm of Certified public accountants which prepared annual financial statements for the Holliman Drilling Company as of May 31 for each year of 1958 through 1962, duly admitted in evidence as Exhibits 15 through 19 inclusive. Each of these annual financial statements refer to the indebtedness due Mrs. C. I. Holliman (Lorena Morris Holliman) and shows the same to be secured by pledge of certain producing oil and gas properties, being the leases in question.

Upon full hearing of this matter and from the testimony offered and the evidence introduced, the court, as the trier of the facts, found that the trustee had failed to meet the burden of proof on two of the required elements of a preference, namely;

1. The same was not "for or on account of an antecedent debt."

2. Absence of proof that "the creditor receiving or to be benefited by the preference, or his agent, had reasonable cause to believe that the debtor was insolvent."

The court therefore makes the following findings of fact:

1. The $70,000.00 originally loaned to the Holliman Drilling Company by Lorena Morris Holliman, was her sole and separate property, having come to her by inheritance from her mother and a gift from her father.

2. The assignment of the three oil and gas leases, two of which were in Texas and one in Oklahoma to Lorena Morris Holliman by the Holliman Drilling Company were not absolute assignments but given only as security to secure the repayment of said sum of $70,000.00 upon which the unpaid principal balance was $40,000.00 as of December 8, 1962.

3. The above assignments of oil and gas leases were not given for or on account of an antecedent debt.

4. The evidence and testimony has failed to establish that Lorena Morris Holliman knew, or had reasonable cause to believe, that the Holliman Drilling Company, a Corporation, was insolvent on October 8, 1957, December 8, 1962, or December 10, 1962, the date of filing said assignments of oil and gas leases of record.

The court therefore makes the following conclusions of law:

1. The assignments of the above oil and gas leases from the Holliman Drilling Company to Lorena Morris Holliman were not absolute assignments but intended only as security for the payment of the original loan in the principal amount of $70,000.00 and upon which the unpaid balance was $40,000.00 as of December 8, 1962.

2. The transfer by way of 3 assignments of oil and gas leases each dated October 8, 1957 did not constitute a voidable preferential transfer as defined in Section 60 of the Bankruptcy Act. (11 U.S.C.A. 96)

IT IS THEREFORE ORDERED that the trustee's application for sale of oil and gas leases is denied insofar as the same seeks to sell said leases free and clear of liens,

encumbrances or claims of Lorena Morris Holliman and said trustee is authorized to sell the same but subject to the security interest of Lorena Morris Holliman; to all of which the trustee is allowed exception.

Dated this 20th day of May, 1963.

/s/ William T. Billups
Referee in Bankruptcy

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA

IN THE MATTER OF	)	
	)	
HOLLIMAN DRILLING COMPANY,	)	In Bankruptcy
a Corporation,	)	No. 14,900
	)	
Bankrupt.	)	

ORDER ADOPTING FINDINGS OF REFEREE, AFFIRMING ORDER OF REFEREE AND DENYING PETITION FOR REVIEW

On this 11th day of July, 1963, there comes on for hearing in regular order pursuant to advance notice the Petition for Review of V. H. Carroll, Trustee in Bankruptcy, of an Order made by the Referee in Bankruptcy on February 12, 1963, denying the Trustee's Application and Amendment thereto for sale of certain oil and gas leases free and clear of liens claimed by Lorena Morris Holliman upon and against the leases specifically described in said Order of said Referee. The Trustee In Bankruptcy, V. H. Carroll, appears in person and by his attorneys, Cox and Eagleton,

by James R. Eagleton, while the Claimant, Lorena Morris Holliman, appears by her attorney, John H. Cantrell. The cause is orally argued fully to the Court by counsel for the respective parties and submitted for decision on the record and such argument.

The Court having considered oral arguments of counsel, the Findings of Fact and Conclusions of Law made and certified to the Court by said Referee and the transcript of the evidence and record in connection therewith, and

The Court having considered the facts and the law applicable thereto,

The Court finds that the Findings of Fact and Conclusions of Law stated by said Referee in connection with said Order are in all things correct and in accordance with the evidence and the law applicable thereto and that same should be by this Court adopted and confirmed in whole. The Court further finds that upon stipulation of the parties heretofore filed of record herein this Order should contain a correct, specific description of the interests upon which the lien claim and rights are asserted and hereby established. The Court further finds that the Order of the Referee should be in all things otherwise approved, confirmed and affirmed and that the Petition for Review of V. H. Carroll, Trustee in Bankruptcy, aforesaid, should be denied.

IT IS THEREFORE ORDERED:

1. The oil and gas leasehold interests and estates as to and concerning which the lien claim and rights of Lorena Morris Holliman are hereby established, affirmed and confirmed are correctly described as follows:

A. An undivided 9/36 interest in and to that certain oil and gas lease dated October 7, 1947, from Mary Lewellyn Reeves, a single woman, Lessor,

to Standard Oil Company of Texas, Lessee, recorded in Volume 321, Page 367, Oil and Gas Records, Cooke County, Texas, insofar only as the said lease covers and affects the following land:

40 acres of land out of the Esteban Mora Survey, Abstract No. 745, described as follows:

Beginning on the West boundary line of said E. Mora Survey, 624 Varas North of the Northwest corner of a 249 acre tract out of said Survey, conveyed to and now owned by B. I. Pybas, at the Northwest corner of a 60 acre tract out of said Survey now owned by Walter S. Barlow;

Thence North with West boundary line of said Survey 416 varas to the Northwest corner of a 100 acre tract conveyed by Walter S. Barlow and wife Ella and Geo. B. Bogwell, by deed dated November 28, 1904, and recorded in Book 88, page 529, Deed Records of Cooke County, Texas;

Thence East 543 varas to the Northeast corner of said 100 acres;

Thence South 416 varas to the Northeast corner of said 60 acres;

Thence West 543 varas to the place of beginning, Cooke County, Texas, (identified in the said lease as "Tract Two").

B. An undivided 9/36 interest in and to that certain oil and gas lease dated October 9, 1947, from Jordan C. Pybas and wife, Lessors, to Standard Oil Company of Texas, Lessee, recorded in Volume 321, page 355, Oil and Gas Lease Records, Cooke County, Texas, insofar only

as the said lease covers and affects the following land:

A tract of land out of the E. Mora Survey, Abstract 745, Cooke County, Texas, and having for its Northwest corner the Northeast corner of a 40 acre tract in said Mora Survey now or formerly owned by Mary Lewellyn Reeves and being bounded on the West by the East line of said Reeves tract and southerly prolongation thereof, on the East by the East line of said Mora Survey, on the North by an easterly prolongation of the North line of said Reeves tract and on the South by a line parallel to and a sufficient distance South of said easterly prolongation to enclose 40 acres of land.

C. An undivided 1/8 interest in and to that certain oil and gas lease dated June 14, 1956, from Irene Riviere, a widow, et al, as Lessor, to John L. Hoard and G. D. Spradlin, as Lessees, recorded in Book 645, page 575, insofar as said lease covers the E/2 of the NE/4 of Section 9, Township 1 South, Range 5 West, Stephens County, Oklahoma;

2. Other than as stated in 1. immediately preceding, the Findings of Fact and Conclusions of Law heretofore made and filed by the Referee as aforesaid and heretofore certified to this Court in connection with the said Petition for Review, and each of them, are approved, confirmed and adopted by the Court as its findings and conclusions;

3. The aforesaid Order of the Referee denying the Trustee's Application and amendment thereto for sale of said oil and gas leases free and clear of liens

owned and held by Lorena Morris Holliman is in all things approved, confirmed and affirmed; and

4. The aforesaid Petition for Review of V. H. Carroll, Trustee in Bankruptcy, of said Order of said Referee entered on February 12, 1963, is denied.

UNITED STATES DISTRICT JUDGE

O.K.:

/s/ John H. Cantrell

/s/ James A. DeBois
Attorneys for Lorena Morris Holliman
O.K. as to form only:

/s/ James R. Eagleton
Attorney for V. H. Carroll,
Trustee in Bankruptcy

APPENDIX C

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT 7457

OFFICE OF THE CLERK
Denver, Colorado, 30202,

October 12, 1964.

Mr. Robert L. Cox,
606 Hales Building,
Oklahoma City, Oklahoma.

RECEIVED
OCT 14 1964
COX & EAGLETON

Dear Mr. Cox:

An order has been entered today in case No. 7457, V. H. Carroll, Trustee, Holliman Drilling Company, a corporation,

v. Lorena Morris Holliman, denying the petition for rehearing.

Very truly yours,

/s/ Robert B. Cartwright
Robert B. Cartwright
Clerk

RBC:nku

CC to:
Mr. John H. Cantrell
2120 First Nat'l Building
Oklahoma City, Oklahoma

APPENDIX D

STATUTE INVOLVED

Sections 60a (2) and b of the Bankruptcy Act (11 U.S.C.A. § 96 a and b) are as follows:

Section a(2) "For the purposes of subdivisions a and b of this section, a transfer of property other than real property shall be deemed to have been made or suffered at the time when it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee. A transfer of real property shall be deemed to have been made or suffered when it became so far perfected that no subsequent bona fide purchase from the debtor could create rights in such property superior to the rights of the transferee. If any transfer of real property is not so perfected against a bona fide purchase, or if any transfer of other property is not so perfected against such liens by legal or equitable proceedings

prior to the filing of a petition initiating a proceeding under this Act, it shall be deemed to have been made immediately before the filing of the petition."

Section b "Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent. Where the preference is voidable, the trustee may recover the property or, if it has been converted, its value from any person who has received or converted such property, except a bona fide purchaser from or lienor of the debtor's transferee for a present fair equivalent value: Provided, however, That where such purchaser or lienor has given less than such value, he shall nevertheless have a lien upon such property, but only to the extent of the consideration actually given by him. Where a preference by way of lien or security title is voidable, the court may on due notice order such lien or title to be preserved for the benefit of the estate, in which event such lien or title shall pass to the trustee. For the purpose of any recovery or avoidance under this section, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction."